

# Shelby County Government

AC Wharton, Jr.  
Mayor

Brian L Kuhn  
County Attorney

January 26, 2007

Honorable A C Wharton, Jr. Mayor of  
Shelby County Government 160N.  
Main, Suite 850 Memphis, Tennessee  
38103

**RE: Review of Tennessee Supreme Court's Knox County Charter Opinion,  
Options for Proposed Amendment(s) to the Shelby County Charter, and  
Procedures for Proposing Amendment(s) [Our File No. CFS # A5078-07]**

Dear Mayor Wharton:

Pursuant to our conversation of January 17, 2007, you requested an opinion on the following:

**ISSUES**

1. In light of the Tennessee Supreme Court's recent opinion relative to the Knox County Charter, should an amendment to the Shelby County Charter be proposed at this time?
2. If so, what amendment(s) to the Shelby County Charter can be proposed at this time to correct any deficiencies?
3. If so, what are the procedures for proposing an amendment to the Shelby County Charter?

**OPINION**

1. Yes. Based on the Tennessee Supreme Court's recent opinion issued in the matter of *Diane Jordan, et al v. Knox County, Tennessee, et al*, relative to the Knox County Charter, and a comparison of the relevant provisions in the Shelby County Charter that are similar to those at issue in the Knox County Charter, it is recommended that an amendment to the Shelby County Charter be proposed at this time.

2. Based on the recent opinion of the Tennessee Supreme Court relative to the Knox County Charter, an amendment to the Shelby County Charter should be proposed at this time that either specifically creates the offices and assigns the duties of the constitutional county officers (sheriff, trustee, register, county clerk, and assessor of property) or assigns the duties of the constitutional county officers to newly titled officers. If no amendment to the Shelby County Charter is proposed, Shelby County will continue to exist as a de facto charter form of government, as was the recent determination of the Tennessee Supreme Court relative to the Knox County Charter.

3. The procedure for amending the Shelby County Charter is a two-step process. First, the amendment must be proposed by (a) a Charter Commission, (b) the Shelby County Board of Commissioners or (c) the qualified voters of Shelby County. Second, once the amendment is proposed, and it must be ratified by a majority of the voters in a referendum election in order to become effective.

## **ANALYSIS**

### **Issue 1 - In light of the Tennessee Supreme Court's recent opinion relative to the Knox County Charter, should an amendment to the Shelby County Charter be proposed at this time?**

By filing suit in Knox County Chancery Court in April 2006, certain elected officials in Knox County challenged the county's 1994 term limits amendment, contending that the Knox County Charter was null and void due to its allegedly improper adoption. In June 2006, the Chancery Court ruled that both the Knox County Charter and the 1994 term limits amendment were invalid, relying heavily on the Tennessee Supreme Court's decision in *Bailey v. County of Shelby*, 188 S.W.2d 539 (Tenn. 2006). Based on the charter enabling legislation, the chancellor reasoned that if the offices of the constitutional county officers [mayor, legislative body, sheriff, trustee, register, county clerk, and assessor] were not mandated by the constitution, the offices and their corresponding responsibilities were abolished when the Knox County Charter took effect in 1990.

On appeal, the Tennessee Supreme Court ("Court") "held that while Knox County failed to comply with the enabling legislation for instituting a charter form of government, since September 1, 1990, Knox County has been governed under a de facto charter with a county mayor, county commissioners, and other de facto officers," officers who "were by inference retained under the charter form." [*Diane Jordan, et al v. Knox County, Tennessee, et al*, No. E2006-01377-SC-RDM-CV at 1 and 34 (Tenn. Jan. 12, 2007).] In reaching this holding, the Court analyzed the Tennessee Constitution, the state enabling legislation for charter forms of county government, and the de facto doctrine, while relying largely on its own opinion in *Bailey*, all of which are discussed below.

Tennessee Constitution (Art. VII, § 1)

When *Bailey v. County of Shelby* was first heard on appeal, the Tennessee Court of Appeals found that the offices of the constitutional county officers [mayor, legislative body, sheriff, trustee, register, county clerk, and assessor] were firmly embodied in the Tennessee Constitution under Art. VII, § 1, so the court was "loathe to disturb a historical ... constitutional mandate." [*Bailey*, 2005 WL 3115915 at \*11.] However, the Tennessee Supreme Court reversed the Court of Appeals, stating the constitution grants "broad authority to a county to go so far as to *replace* its existing government in favor of an alternative government, provided the people approve." [*Bailey*, 188 S.W.3d at 546.]

The relevant provisions of the Tennessee Constitution read as follows:

The qualified voters of each county shall elect for terms of four years a legislative body, a county executive, a Sheriff, a Trustee, a Register, a County Clerk and an Assessor of Property. Their qualifications and duties shall be prescribed by the General Assembly. Any officer shall be removed for malfeasance or neglect of duty as prescribed by the General Assembly.

The General Assembly may provide alternate forms of county government including the right to charter and the manner by which a referendum may be called. The new form of government shall replace the existing form if approved by a majority of the voters in the referendum.

Tenn. Const., Art. VII, § 1, paras. 1 and 3.] It should be noted that the County Attorney's Office filed an Amicus Curiae, as friend of the court, Brief taking the position that the constitutional county officers survive the adoption of a charter form of government because their existence is mandated by the first paragraph of Art. VII, § 1 of the Tennessee Constitution. [Amicus Curiae Brief of Shelby County at 5 (Aug. 9, 2006).] Even the Court noted that "the Attorney General, after a review of the debates, opined 'that the [1977 constitutional] convention's intent was to require the officers enumerated in Paragraph 1 to be retained even under an alternate form of government' as described in the third paragraph. For over 25 years, this view has prevailed." [*Jordan*, at 19.] However, in analyzing these provisions, together with the interpretation by the appellate court in *Bailey*, the Tennessee Supreme Court

rejected] the notion that an alternative government formed under the third paragraph ... must conform to the language in the first paragraph ..., i.e., "qualifications and duties [of elected county officials] shall be prescribed by the General Assembly" only. To hold otherwise would mean that a county could adopt a new form of government that is controlled by the old form of government that the new one replaced.

[*Jordan*, at 21 (citing *Bailey*, 188 S.W.3d at 546).]

For two reasons, the Court went on to point out that the offices of the constitutional county officers must be "created" under the charter. [*Jordan*, at 23.] First, as implied in *Bailey*, the enabling legislation "provides that it is only when the charter does 'retain' the constitutional county offices in the alternate form of government that the duties, as already described by our constitution and statute, may not be diminished." [*Jordan*, at 22 (citing Tenn. Code Ann. §5-1-210(12)).] Second, the court is of the opinion that the third paragraph of Article VII of the constitution "grants the power to the counties not to have these officers at all." [*Jordan*, at 23.]

Based on this constitutional analysis, the Court found the Knox County Charter incomplete and, therefore, invalid. The primary problem being that the charter "does not provide for the constitutional county officers or otherwise assign their duties to any other office, agency, or official." [*Jordan*, at 23.] It is the Court's opinion that the charter must either expressly establish "the offices of sheriff, trustee, register of deeds, county clerk, [and] ... property assessor" or it must explicitly assign "the duties and functions traditionally performed by those officials to ... other administrative or executive officers." [*Jordan*, at 3.] The Court pointed out that one article of the Knox County Charter made reference to the office of the sheriff, but it did not specifically enumerate the functions of the office. Further evidence of the incompleteness is that the Knox County Charter only contained passing references to some of the other constitutional county officers. [*Jordan*, at 3.] It was not sufficient, although recognized by the Court, that the charter "commission members labored under the premise that they lacked the power to alter or abolish those traditional county offices identified by our state constitution." [*Jordan*, at 3 (citing Minutes of the Knox County Home Rule Charter Commission (Aug. 2, 1988; Aug. 16, 1988; Aug. 24, 1988).] Relying on this analysis, it is believed that a court would likewise find that the Shelby County Charter is incomplete because it "does not [expressly] provide for the constitutional county officers or otherwise assign their duties to any other office, agency or official" [*Jordan*, at 23.]

#### Charter Enabling Legislation (Tenn. Code Ann. §§ 5-1-201 to 215')

In 1978, the Tennessee General Assembly approved the enabling legislation that authorizes counties to restructure county government by creating "an alternative form of county government to perform all the governmental and corporate functions previously performed by the county." [Term. Code Ann. §§ 5-1-201 to 215 (enacting Pub. Acts 1978, c. 1428-69).] When a charter is adopted, the alternate form replaces the existing form of government as of the effective date of the charter and "no right, power, duty, obligation or function of any officer, agency or office of such county shall be retained and continued unless [the enabling act] or the charter of such county expressly so provides or unless such retention and continuation be required by the Constitution of Tennessee." [Tenn. Code Ann. §§ 5-1-202(a) and 203.]

However, "the duties of the constitutional county officers [mayor, legislative body, sheriff, trustee, register, county clerk, and assessor] as prescribed by the general assembly shall not be diminished under a county charter form of government." [Tenn. Code Ann. § 5-1-210(12).] As noted by the Court, based on this provision of the enabling legislation, Knox County contended that its "1990 charter was designed upon the very basic premise that [except for the mayor and

legislative body] all of the other offices [sheriff, trustee, register, county clerk, and assessor] would continue by operation of law independent of the content of the charter" as required by Art. VII, § 1, para. 1 of the Tennessee Constitution. [*Jordan*, at 17.] In other words, it was believed that those individuals elected in Knox County to the offices of sheriff, trustee, register, county clerk, and assessor "would perform the traditional duties of their offices" as established by the Tennessee General Assembly. [*Jordan*, at 17.] This was likewise the belief of the Shelby County Charter Commission in 1984, as recalled by Brian L. Kuhn, attorney for the Shelby County Charter Commission, and John L. Ryder, member of the Shelby County Charter Commission.

#### De Facto Government/De Facto Officials

On appeal, the Tennessee Supreme Court ("Court") agreed with the trial court that the Knox County Charter was invalid because of a failure to comply with the enabling legislation. [*Jordan*, at 27.] However, the Court found that Knox County's existence has been valid because there was "a colorable and bona fide attempt to perfect an organization under the applicable enabling legislation." [*Jordan*, at 27 (citing the Supreme Court of Minnesota in *Bowman v. City of Moorhead*, 36 N.W.2d 7 (Minn. 1949) (stressing importance of stability and certainty in local governmental matters and emphasizing need to avoid severe consequences).] Therefore, the Court held that Knox County has existed as a de facto form of government, based on the charter document, since September 1, 1990. [*Jordan*, at 27 (applying de facto doctrine to charter for local governmental "entity," as opposed to "officer," for the first time).] A de facto government is one that exists "in fact" and is effective, even without a formal or legal basis. [*Jordan*, at 23; *Norton v. Shelby County*, 118 U.S. 425, 448 (1886).] Relying on this analysis, it is believed that a court would likewise hold that Shelby County has acted as a de fact government since September 1, 1986.

As for the officers, the Court stated, "it was not unreasonable for the [Knox County] voters to assume that all of these offices [of mayor, legislative body, trustee, sheriff, register, county clerk, and assessor] existed as part of their county government" since 1990, when the charter became effective. [*Jordan*, at 26-27.] For sixteen (16) years, the Knox County officers have been duly elected and have served in an official capacity without challenge. [*Jordan*, at 27,] The citizens of Knox County have acquiesced in the acts of these officers for a length of time that establishes "the presumption of colorable right to the offices." [*Jordan*, at 27 (citing to *Ridout v. State*, 30 S.W.2d 255, 257 (Tenn. 1930).] Relying on this analysis, it is believed that a court would likewise hold that the constitutional county officers of Shelby County [sheriff, trustee, register, county clerk, and assessor] have acted as de facto officers, being duly elected and having served since September 1, 1986, and their actions have been valid. After a review of the Tennessee Supreme Court's analysis of the Tennessee Constitution, enabling legislation for charter forms of county government, and de facto doctrine, it is recommended that an amendment to the Shelby County Charter be proposed at this time.

Issue 2: What amendment(s) to the Shelby County Charter can be proposed at this time to correct any deficiencies?

In determining what type of amendment(s) to the Shelby County Charter can be proposed at this time to correct any deficiencies, the analysis should begin with a comparison of the Shelby County Charter to that of Knox County. Then, the holdings, findings and conclusions of the Tennessee Supreme Court relative to the Knox County Charter, addressing both substantive and procedural deficiencies, should be applied to the Shelby County Charter.

In comparing the Shelby County Charter ("Shelby Charter") to the Knox County Charter ("Knox Charter"), the primary focus should be on the substantive and procedural deficiencies identified by the Knox County Chancery Court and confirmed by the Tennessee Supreme Court relative to the Knox Charter, not only because Shelby County likewise operates as a charter form of government, but also because the Shelby Charter was the model used for creating the Knox Charter. Specifically, the Court looked at whether the Knox Charter created the offices and/or otherwise assigned the duties of the constitutional county officers (sheriff, trustee, register, county clerk, and assessor) in order to address the issue of whether the term limits provision applied to those officers. The Court also addressed whether the procedures for adopting a charter form of government were fulfilled by Knox County.

Comparison 1: Charter Contents - Constitutional County Officers (Substantive Deficiencies')

Like the Knox Charter, the Shelby Charter clearly creates the offices and assigns the duties of the County Mayor and County Commission. However, the Court found that the Knox Charter simply "made reference to the office of sheriff but did not specifically enumerate the functions of the office [and] ... contained only passing references to other state constitutional officers that had existed under the prior form of county government." [*Jordan*, at 3.] The provision in the Knox Charter that references the sheriff reads as follows:

The Sheriff shall be the Chief Law Enforcement Officer of the County and is charged with the enforcement of such ordinances as provided in this Charter. The Sheriff shall be elected by the qualified voters of Knox County according to law, and shall have all powers and duties, either expressly or impliedly, now or hereafter conferred by law and this Charter.

Knox County Charter, Art. III, § 3.09. This provision appears to be adopted from the Shelby Charter provision identifying the sheriff, which read as follows:

The Sheriff shall be the chief law enforcement officer of the County and is charged with the enforcement of ordinances of the County of Shelby. The Sheriff shall be elected by the qualified voters of Shelby County according to law and all duties, conferred or implied by law, shall expressly continue as they existed prior to the enactment of this Charter.

Shelby County Charter, Art. IV, § 4.06. Because the Shelby Charter provision identifying the sheriff is basically mirrored in the Knox Charter, it is believed that a court would find that this provision does not expressly establish the office of sheriff. [Shelby County Charter, § 4.06.]

It is the Court's opinion that the Knox Charter "provisions neither expressly established the offices of sheriff, trustee, register of deeds, county clerk, or property assessor, nor explicitly assigned the duties and functions traditionally performed by those officials to any other administrative or executive officers." [*Jordan*, at 3.] The reason for the omission of such provisions in the Knox Charter was based on the Charter Commission's presumption "that they lacked the power to alter or abolish those traditional county offices identified by our state constitution." [*Jordan*, at 3 (citing Minutes of the Knox County Home Rule Charter Commission (Aug. 2, 1988; Aug. 16, 1988; Aug. 24, 1988).]

Like the Knox County Charter Commission, and as recalled by Brian L. Kuhn, attorney for the Shelby County Charter Commission, and John L. Ryder, member of the Shelby County Charter Commission, the Shelby County Charter Commission created in 1983 believed it did not have the power to alter or abolish the offices of the constitutional county officers based on the enabling legislation itself which reads in pertinent part as follows: "That the duties of the constitutional county officers as prescribed by the general assembly shall not be diminished under a county charter form of government." [Tenn. Code Ann. § 5-1-210(12).] In fact, under the prohibitions article of the Shelby Charter adopts the language of Tenn. Code Ann. § 5-1-210(12) verbatim. [Shelby County Charter, Art. VI, § 6.04.] Further, like the Tennessee Court of Appeals, the Shelby County Charter Commission believed that the existence of the constitutional county officers was a clear mandate under the Tennessee Constitution. [Amicus Curiae Brief of Shelby County at 5 (Aug. 9, 2006); See Tenn. Const., Art. VII, § 1, para. 1 and *Bailey v. County of Shelby*, 2005 WL 3115915 at 11 (Tenn. Ct. App. 2005).]

Like the Knox Charter, the Shelby Charter likewise lacks the specificity the Tennessee Supreme Court deems necessary for a charter to be complete. Specifically, the Shelby Charter simply recognizes the existence of the offices of sheriff, trustee, register, county clerk, and assessor, by title, in the legislative branch article of the charter. Therein, members of the Board of County Commissioners are advised that they will be disqualified from voting to fill the office of sheriff, trustee, register, county clerk, and assessor, if they accept a nomination for any of those offices, among others. [Shelby County Charter, § 2.03.] Otherwise, the Shelby Charter uses references to these officials such as "elective officers," "elected offices," "constitutional officers," and "elected and appointed officers." [Shelby County Charter, §§ 5.06 (method of electing officers), 5.07 (qualification and oath of elected officers), 6.04 (charter cannot diminish duties of constitutional county officers), and 7.10 (elected or appointed officers with definite terms hold office until successor elected or appointed and qualified).] Further, based on these provisions of the Shelby Charter, it is believed that a court would find that they do not expressly establish the offices of these constitutional county officers. [Shelby County Charter, § 4.06.]

Comparison 2: Charter Contents - Term Limits (Substantive and Procedural Deficiencies')

The Tennessee Supreme Court ("Court") has "upheld the concept of term limits," specifically determining that they are a "qualification for holding office" on a county legislative body within the meaning of the charter enabling legislation." [*Jordan*, at 28 (citing *Bailey*, 188 S.W.3d at 544-45); Tenn. code Ann. 5-1-210(4).] Further, the Court held that "the voters [of Knox County] may also set eligibility requirements, including term limitations, for the other elected officials in county government," including the sheriff, trustee, register, county clerk, and assessor. [*Jordan*, at 29 and 33-34.] For those officers who became ineligible for another term following this opinion, they will hold office until a successor is elected or appointed and qualified, continuing as de facto officers. [*Jordan*, at 34 (citing Tenn. Const., Art. VII, § 5).] Although the term limits provision of the Knox Charter provided for its application to "any elected office," under state law, the term limits provision cannot extend to a school board member. [*Jordan*, at 32 (citing Tenn. Code Ann. § 49-2-201 (a)(1) ("Education Improvement Act of 1991" trumps charter term limits amendment).] [Shelby County Charter, Art. VI, § 6.02 (excluding application of charter to county board of education).] Further, a charter term limits provision has no application to court clerks, because their offices exist as part of the judicial branch of the government. [*Jordan*, at 32 (citing Tenn. Const. Art. VI, § 13 (Judicial Branch, Clerks of court) and Tenn. Code Ann. § 5-1-204(f)(1) (directing the judicial system be unaffected by charter form of government).] Like their court clerks, judges are not governed by charter term limits provisions. [Tenn. Const. Art. VI, § 4 (Judicial Branch, Inferior court judges); Shelby County Charter, Art. IV, § 4.01 (county judges have powers and duties conferred or implied by law).]

After clarifying the applicability of the term limits provision of the Knox Charter, and its constitutionality, the Court addressed the procedural deficiencies that followed the adoption of the term limits amendment. The Court held "that the procedural deficiencies after the adoption of the amendment are of no consequence," finding "the nature of the charter's terms governing process are directory rather than mandatory" and have been resolved. [*Jordan*, at 33 and 34 (citing *Marks v. New Orleans Police Dep't*, 2006 WL 342300 at 6 (La. Nov. 29, 2006).] Further, the Knox County "term limits amendment, enacted under the de facto charter, meets standards of due process and must be upheld as a component of the governmental unit." [*Jordan*, at 34.]

The term limits provision of the Shelby Charter is explicit as to the offices affected, the County Mayor and Board of County Commissioners. [Shelby County Charter, §2.03G.] And, as the Tennessee Supreme Court held in *Bailey*, the "term limit provision contained in [the Shelby] county charter was authorized by [the] statute authorizing county to establish the 'qualifications for holding office' of the members of the county legislative body, and such statute did not amount to an unconstitutional delegation of the legislature's authority to establish the qualifications of elected officials." [*Bailey v. County of Shelby*, 188 S.W.3d 359 (Tenn. 2006).] Therefore, the term limits provision in the Shelby Charter is unaffected by the recent opinion of the Tennessee Supreme Court relative to the Knox Charter.



### Comparison 3: Charter Adoption (Procedural Deficiencies)

The Knox Charter was ratified in 1988 by voter referendum. However, "neither the returns of the referendum nor a copy of the charter was certified by the Knox County Election Commission to the Secretary of State [and, therefore,] the Secretary of State did not issue a proclamation confirming the results of the referendum" as required by Term. Code Ann. §§ 5-1-209(e)(1) to (e)(2). [*Jordan*, at 4.] Although not a point of contention in the Knox County case, this procedural deficiency is of no consequence because where "the terms of a statute are limited to what is required to be done, i.e., procedural rules, then the statute is considered directory even though mandatory language is employed." [*Jordan*, at 33 (citing to *Marks v. New Orleans Police Dep't*, 2006 WL 342300 at \*6 (La. Nov. 29, 2006).] In August 2006, the referendum returns and original charter of Knox County were certified to the Secretary of State, thereby correcting the procedural deficiency, and the Secretary of State issued a proclamation acknowledging receipt of same on August 24, 2006.

In comparison, the Shelby Charter was ratified by voter referendum on August 2, 1984 and became effective on September 1, 1986. The Election Commission certified the referendum results to the State Governor, Secretary of State, State Elections Coordinator, and Shelby County Clerk on August 13, 1984. Because the charter was not included with the referendum results following its ratification by the voters, both documents were certified by the Election Commission to the Secretary of State on September 21, 2006. On November 14, 2006, the Secretary of State issued a proclamation which was received by the Election Commission and subsequently filed with the Shelby County Clerk on December 1, 2006. Therefore, any procedural deficiency in the adoption of the Shelby Charter has been corrected by Shelby County.

### Options for Proposing Amendment(s) to Shelby County Charter

Based on the comparison between the Shelby Charter and the Knox Charter, and in light of the recent opinion of the Tennessee Supreme Court relative to the Knox Charter, Shelby County should propose a charter amendment at this time. If no amendment is proposed and subsequently ratified by the voters, Shelby County would continue to operate as a de facto charter form of government, and the Sheriff, Trustee, Register, County Clerk, and Assessor as de facto officers, which is not recommended by the County Attorney's Office. As gleaned from the Court's opinion, Shelby County has two (2) options for proposing an amendment.

First, Shelby County could propose a charter amendment like the one recently proposed by Knox County for the purpose of correcting the deficiencies identified by the Knox County Chancery Court and confirmed by the Tennessee Supreme Court ("Court"). [*Jordan*, at 10.] On November 7, 2006, the voters of Knox County ratified Proposed Amendment No. 1 to repeal Section 3.09 of the Knox Charter and create a new article entitled "Other Officers." [*See* Comparison 1 above for text of § 3.09 of the Knox Charter relative to the sheriff] The new article of the Knox Charter contains six (6) subsections entitled "Property Assessor," "Sheriff," "Register of Deeds," "County Clerk," "Trustee," and "Elections and Filling Vacancies," respectively.

Therein, all of the duties of the constitutional county officers are expressly assigned to each of them. A copy of Proposed Amendment No. 1 of Knox County is attached hereto as Exhibit "A."

On November 9, 2006, the Law Director of Knox County filed a motion requesting the Court consider post-judgment facts to include the results of the November 7, 2006 voter referendum and ratification of Proposed Amendment No. 1. [*Jordan*, at 10.] By order of December 13, 2006, the Court granted Knox County's motion, finding it appropriate to add the election results to the record. [*Jordan*, at 10.] In its final opinion, the Court acknowledged that the amendments passed by a majority of the vote, but did not address whether the amendments were sufficient to cure the identified deficiencies. However, it is presumed that if Shelby County proposed, and the voters ratified, a similar amendment, the amendment would survive a legal challenge.

Second, the Court made several references in the Knox Charter opinion that indicate an amendment to the Shelby Charter could be proposed that assigns all of the administrative duties of county government to newly titled officers. [*Jordan*, at 3, 15, 16, 21, 23.] This type of amendment would thereby abolish some or all of the offices of the constitutional county officers and require that other sections of the Shelby Charter be amended where references are made to "elective officers," "elected offices," "constitutional officers," and "elected and appointed officers." However, no county in the state of Tennessee has adopted a charter form of government with such an effect. Therefore, there is no express authority for the adoption of such a charter, and the only implied authority is the statements made by the Court in its Knox Charter opinion. It should be clearly stated that these statements are not the holding of the Court and this type of charter was not at issue in the Knox County case.

### Issue 3 - What are the procedures for proposing an amendment to the Shelby County Charter?

As authorized by Tenn Code Ann. § 5-1-210(9), Article V, Section 5.05 of the Shelby County Charter ("Charter") establishes the procedures for amending the Charter and provides for three (3) such methods. First, a Charter Commission may frame and propose a charter amendment. Second, by ordinance, the Shelby County Board of Commissioners may propose a charter amendment by two-thirds vote. Third, the voters of Shelby County may file a petition with the Chairman of the Shelby County Board of Commissioners proposing a charter amendment. Once the amendment has been proposed by one of these methods, the proposed amendment must be submitted to the Election Commission in the manner provided by general state law for a voter referendum election. Each of the three (3) methods for proposing a charter amendment is discussed in detail below.

#### Method 1: Amendment Proposed by Charter Commission

A Charter Commission may frame and propose amendments to the Charter in the same "manner provided by law for the framing, proposal and submission of new charters." [Shelby

County Charter, Art. V, § 5.05A.] If this method of amending the Charter is utilized, it is a three-step process. First, the Charter Commission must be created for the purpose of amending the Charter. [See Tenn. Code Ann. § 5-1-204 (setting forth procedure for creating charter commission to propose charter).] Second, the Charter Commission must frame the proposed amendment. [Shelby County Charter, Art. V, § 5.05A (directing charter commission to rely on the general state law used in proposing a new charter); Tenn. Code Ann. §§ 5-1-201 to 215 (charter enabling legislation).] Third, the Charter Commission must submit the proposed amendment to the Election Commission for a voter referendum election. [Tenn. Code Ann. §§ 5-1-208 (governing charter proposal by charter commission); Tenn. Code Ann. §§ 2-5-151 and 2-12-111 (setting forth requirements for holding referendum elections and publishing notice of elections).]

#### Method 2: Amendment Proposed by Shelby County Board of Commissioners

The Shelby County Board of Commissioners may frame and propose amendments to the Charter by two-thirds vote adopting an ordinance. [Shelby County Charter, Art. V, §5.05B.] If this method of amending the Charter is utilized, the process is governed by the procedures and requirements prescribed for the adoption of all ordinances, with the exception of the directory provisions in Section 5.05B of the Charter. Specifically, an ordinance proposing a charter amendment must contain the following after the enacting clause:

- (1) A statement that the charter amendment set out in the ordinance is proposed for submission to the voters of the county in accordance with the requirements of this charter, and
- (2) The full text of the proposed charter amendment.

[Shelby County Charter, Art. V, §5.05B.] Upon adoption, this ordinance becomes effective and has two immediate effects: (1) the Clerk of the Shelby County Board of Commissioners is required to deliver a certified copy of the ordinance to the County Election Commission and (2) the County Election Commission is required to submit the proposed charter amendment to the voters of Shelby County for referendum election. [Shelby County Charter, Art. V, §5.05B; Tenn. Code Ann. §§ 2-5-151 and 2-12-111 (setting forth requirements for holding referendum elections and publishing notice of elections).]

If Shelby County proposes one of the two (2) charter amendments discussed herein, it is recommended that the amendment be proposed by the Shelby County Board of Commissioners. The reason for this recommendation is that the amendment is one limited to correcting the deficiencies in the Shelby Charter similar to those recently corrected in the KNOX Charter, and it is believed that the length of time for proposing the amendment would be shortened as well.

#### Method 3: Amendment Proposed by Voters of Shelby County

The voters of Shelby County may frame and propose amendments to the Charter by petition. The petition must be addressed to the Shelby County Board of Commissioners, contain the full

text of the proposed amendment, be signed by at least fifteen percent (15%) of the registered voters of Shelby County, and be filed with the Clerk of the Shelby County Board of Commissioners. [Tenn. Code Ann. § 2-5-151(d) and Shelby County Charter, Art. V, § 5.05C] [NOTE: The required number of voters under Section 5.05C of the Charter has been superceded by Tenn. Code Ann. § 2-5-151(d).] Upon receipt of the voter petition, the Clerk of the Shelby County Board of Commissioners must immediately deliver the petition to the County Election Commission for submission to a voter referendum election. [Shelby County Charter, Art. V, § 5.05C] [See Tenn. Code Ann. §§ 2-5-151 and 2-12-111 (setting forth requirements for holding referendum elections and publishing notice of elections).]

### **CONCLUSION**

In light of the recent opinion of the Tennessee Supreme Court relative to the Knox Charter, and based on a comparison between the Shelby County Charter and the Knox County Charter, it is recommended that an amendment to the Shelby County Charter be proposed at this time. If no amendment is proposed, and subsequently ratified by the voters, Shelby County would continue to operate as a de facto charter form of government, and the constitutional county officers, to include the Sheriff, Trustee, Register, County Clerk, and Assessor, will continue to hold office as de facto officers, which is not recommended by the County Attorney's Office. It is the opinion of the County Attorney's Office that Shelby County has two (2) options for proposing an amendment to correct the deficiencies in the Shelby County Charter relative to creating the offices and assigning the duties of the constitutional county officers.

First, Shelby County could propose an amendment to repeal Section 4.06, relative to the sheriff, and create a new Article VIII, entitled "Other Officers," relying on the Proposed Amendment No. 1 of Knox County, as ratified by the voters of Knox County on November 7, 2006 and attached hereto as Exhibit "A." The new Article VIII would assign the duties of the constitutional county officers, thereby expressly creating the offices of those officers. Second, Shelby County could propose a charter amendment that assigns all of the administrative duties of county government to newly titled officers, thereby abolishing some or all of the offices of the constitutional county officers. This option would also require that other sections of the Shelby County Charter be amended wherein references are made to "elective officers," "elected offices," "constitutional officers," and "elected and appointed officers." However, the County Attorney's Office is of the opinion that the first option is more likely to withstand a legal challenge.

In proposing and amending the Shelby County Charter, there are three (3) methods available, as set forth in Article V, Section 5.05 of the Shelby County Charter. First, a Charter Commission may frame and propose a charter amendment. Second, by ordinance, the Shelby County Board of Commissioners may propose a charter amendment by two-thirds vote. Third, at least fifteen (15%) of the registered voters of Shelby County may file a petition with the Chairman of the Shelby County Board of Commissioners proposing a charter amendment. Once the amendment has been proposed by one of these methods, the proposed amendment must be submitted to the Election Commission for a voter referendum election. Again, if Shelby County

Honorable A C Wharton, Jr.  
Mayor of Shelby County Government  
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proposes one of the two (2) charter amendments discussed herein, it is recommended that the amendment be proposed by the Shelby County Board of Commissioners, because the amendment is one limited to correcting the deficiencies in the Shelby Charter similar to those recently corrected in the Knox County Charter, and it is believed that the length of time for proposing the amendment would be shortened.

Respectfully submitted,



Brian L. Kuhn Shelby  
County Attorney



Christy L. Kinard Assistant  
County Attorney



John L. RyHer  
Assistant County Attorney

cc: All County Commissioners  
Mark Luttrell, Jr., County Sheriff Bob  
Patterson, County Trustee Tom  
Leatherwood, County Register Debbie  
Stamson, County Clerk Rita Clark,  
County Assessor

## PUBLIC NOTICE

### CHARTER AMENDMENTS PROPOSED AND APPROVED BY THE KNOX COUNTY CHARTER REVIEW COMMITTEE FOR THE AMENDMENT OF THE KNOX COUNTY CHARTER:

#### PROPOSED AMENDMENT NO. 1:

Ballot Question: Shall Section 3.09 of the Knox County Charter be repealed and the Charter be amended to add a new Article IV entitled "Other Officers" to provide for the duties of the Assessor of Property in the Knox County Property Assessor, the duties of the Sheriff in the Knox County Sheriff, the duties of the Register of Deeds in the Knox County Register of Deeds, the duties of the County Clerk in the Knox County County Clerk and the duties of the Trustee in the Knox County Trustee, all of whose elections, duties, qualifications, oaths of office, bond requirements and compensation are governed by the Constitution and laws of the State of Tennessee and the Charter of Knox County, unless otherwise amended by this charter, and whose appointment, in the event of a vacancy, shall be filled in accordance with the Constitution and laws of the State of Tennessee and the Charter of Knox County, as more fully set forth in the Charter Review Committee Proposed Amendments, as duly published and filed with the Office of the County Clerk, (such that current Article IV shall be renumbered Article V and the subsequent Articles shall be renumbered accordingly)?

YES \_\_\_\_\_

NO -----^---

#### THE PROPOSED AMENDMENT

Shall the Knox County Charter be amended by repealing Section 3.09 and creating a new Article IV, entitled "Other Officers" as set forth below, such that the current Knox County Charter Article IV and all of its sections shall be renamed "Article V" and all subsequent Articles renumbered accordingly:

#### Article IV. Other Officers

##### 4.01 Property Assessor

The duties of the Assessor of Property are vested in and exercised by the Knox County Property Assessor. The duties, qualifications, oath of office, bond requirements and compensation of the Assessor of Property shall be governed by the Constitution and laws of the State of Tennessee and the Knox County Charter. The duties of this office shall include, but not be limited to, the responsibility of determining and recording the value of all property within the county, whether real, personal or mixed, except for the property of public utilities valued by the State; provided, however, that nothing in this section shall diminish the duties of the Office of the Property Assessor as prescribed by

the General Assembly, although additional duties may be given to this office by this Charter or by Ordinance of the County Commission.

#### 4.02 Sheriff

The duties of the Sheriff are vested in and exercised by the Knox County Sheriff, who shall be the Chief Law Enforcement Officer of Knox County. The duties, qualifications, oath of office, bond requirements, and compensation of the Knox County Sheriff shall be governed by the Constitution and laws of the State of Tennessee and the Knox County Charter. The general duties of Sheriff shall include, but not be limited to, being the Chief Law Enforcement Officer of Knox County, maintaining the jails of the County, providing courthouse and courtroom security and providing civil and criminal warrants service as well as those duties traditionally performed by the Sheriff in accordance with common law; provided, however, that nothing in this section shall diminish the duties of the Office of the Sheriff as prescribed by the General Assembly, although additional duties may be given to this office by this Charter or by Ordinance of the County Commission.

#### 4.03 Register of Deeds

The duties of the Register of Deeds are vested in and exercised by the Knox County Register of Deeds. The duties, qualifications, oath of office, bond requirements and compensation of the Register of Deeds shall be governed by the constitution and laws of the State of Tennessee and the Knox County Charter. The duties of this office shall include, but not be limited to, the responsibility for the filing or recordation of documents that affect the legal status of real or personal property; provided, however, that nothing in this section shall diminish the duties of the Office of the Register of Deeds as prescribed by the General Assembly, although additional duties may be given to this office by this Charter or by Ordinance of the County Commission.

#### 4.04 County Clerk

The duties of the County Clerk are vested in and exercised by the Knox County County Clerk. The duties, qualifications, oath of office, bond requirements, and compensation of the County Clerk shall be governed by the Constitution and laws of the State of Tennessee and the Knox County Charter. The general duties of this office shall include, but not be limited to, the responsibility for the collection of business taxes, motor vehicle registration and licensing, the collection of wheel taxes, the issuance of marriage and other licenses, and the keeping of records of the county's notaries public; provided, however, that nothing in this section shall diminish the duties of the Office of the County Clerk as prescribed by the General Assembly, although additional duties may be given to this office by this Charter or by Ordinance of the County Commission.

#### 4.05 Trustee

The duties of the Trustee are vested in and exercised by the Knox County Trustee. The duties, qualifications, oath of office, bond requirements, and compensation of the Trustee shall be governed by the Constitution and laws of the State of Tennessee and the Knox County Charter. The general duties of this office shall include, but not be limited to, the responsibility for the collection of property taxes, the collection and disbursement of County funds, and the management of the county's cash flow and the investment of idle County funds; provided, however, that nothing in this section shall diminish the duties of the Office of the County Trustee as prescribed by the General Assembly, although additional duties may be given to this office by this Charter or by Ordinance of the County Commission.

#### **4.06 Elections and Filling Vacancies**

The officers listed in Article IV shall be elected by the voters of Knox County in accordance with the Constitution and general laws of the State of Tennessee and the Knox County Charter. Any vacancy in the offices listed in Article IV shall be filled in accordance with the Constitution and laws of the State of Tennessee and the Charter of Knox County.